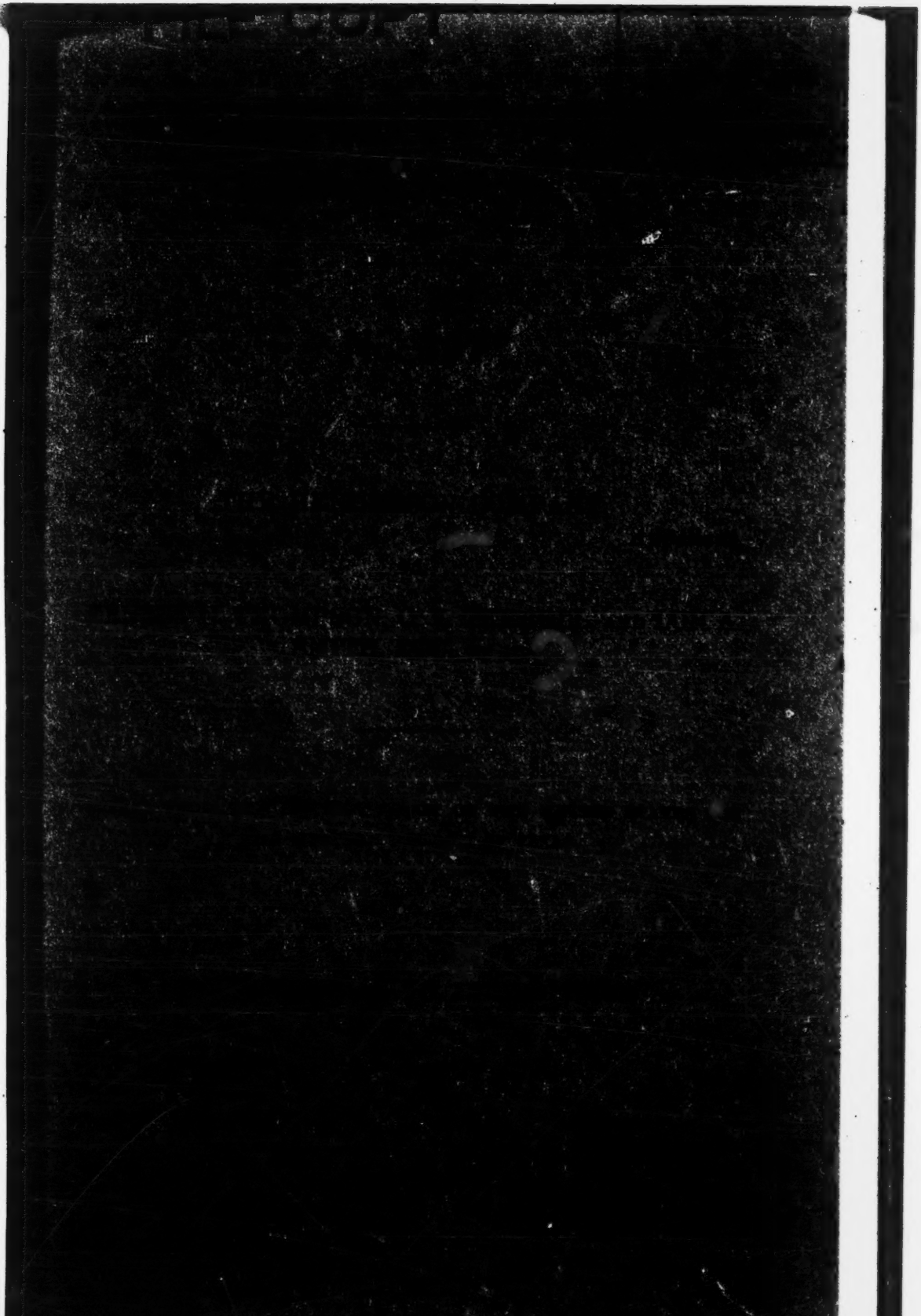

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

In Equity.

No. 535

THE HENDERSON COMPANY,
Complainant,

vs.

ERNEST O. THOMPSON ET AL.,
Defendants.

STATEMENT DISCLOSING BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, UNDER SUPREME COURT RULE 12, AS AMENDED.

Now comes The Henderson Company, complainant in the above entitled and numbered cause, and submits and files this, its statement, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree rendered in this cause:

I.

This suit was instituted by complainant, The Henderson Company, against defendants Ernest O. Thompson, C. V.

Terrell and Lon A. Smith, constituting the Railroad Commission of Texas, and William McCraw, Attorney General of Texas, to secure interlocutory and permanent injunctions against the enforcement of certain provisions of an act of the Legislature of Texas, Forty-fourth Regular Session, and certain orders promulgated thereunder by the Railroad Commission of Texas, charged with the enforcement of said act, it being alleged that the complained of provisions of such statute and the orders of the Railroad Commission promulgated thereunder violated complainant's rights, under the Fourteenth Amendment to the Constitution of the United States, and Section 10, Article 1 of said Constitution. That, in accordance with the provisions of the Judicial Code, Section 266, as amended (Title 28, Sec. 380, U. S. C. A.), a three-judge court was convened, which court heard and denied complainant's application for interlocutory and permanent injunctions.

II.

The statutes believed to sustain the jurisdiction of the Supreme Court to review the judgment or decree in question, are:

(a) Judicial Code, Section 266, as amended (Title 28, Sec. 380, U. S. C. A.), which section specifically provides in part as follows: "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case, * * * and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(b) Judicial Code, Section 238, as amended (Title 28, Sec. 345, U. S. C. A.), which provides in part as follows: "A direct review by the Supreme Court of the interlocutory or the final judgment or decree of a district court may be

had where it is so provided in the following sections, and not otherwise:" * * * (3)Section 380 of this Title.

III.

The Statute of the State of Texas, the validity of which is involved, is Chapter 120, Acts of 1935, Forty-fourth Legislature, page 318 Regular Session; Article 6008, Title 102, Vernon's Annotated Texas Statutes, Revision of 1925 (commonly referred to as House Bill 266). Said statute may be found in Volume I, page 318, General and Special Laws of the State of Texas passed by the Forty-fourth Legislature at the Regular Session. (Convened January 8, 1935, adjourned May 11, 1935.) The provisions of said statute are as follows:

Be It Enacted by the Legislature of the State of Texas:

SECTION 1. Declaration of Policy—In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

Article 6008 of the Revised Civil Statutes of Texas of 1925 as amended by Chapter 26, Acts of the First Called Session of the Forty-second Legislature, as amended by Chapter 100, Acts of the Regular Session of the Forty-third Legislature, as amended by Chapter 88, Acts of the First Called Session of the Forty-third Legislature, is hereby amended so as to hereafter read as follows:

SEC. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article to-wit:

(a) "Commission" means the Railroad Commission of Texas;

(b) "Person" means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind;

(c) The term "Common Reservoir" as used in this Article shall mean any oil and/or gas field or part thereof which comprises and includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

(d) The term "gas well" is any well (a) which produces natural gas not associated or blended with crude petroleum oil at the time of production, or (b) which produces more than one hundred thousand (100,000) cubic feet of natural gas to each barrel of crude petroleum oil from the same producing horizon, or (c) which produces natural gas from a formation or producing horizon productive of gas only encountered in a well bore through which crude petroleum oil also is produced through the inside of another string of casing.

(e) The term "oil well" is any well which produces one (1) barrel or more of crude petroleum oil to each one hundred thousand (100,000) cubic feet of natural gas.

(f) "Dry gas" is any natural gas produced from a stratum that does not produce crude petroleum oil.

(g) The term "Sour gas" shall mean any natural gas containing more than one and one-half (1½) grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.

(h) The term "sweet gas" shall mean all natural gas except "sour gas" and "casinghead gas".

(i) The term "casinghead gas" shall mean any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil.

(j) The term "natural gasoline" shall apply to gasoline manufactured from casinghead gas or from any natural gas.

(k) For the purposes of this Article, by the term "cubic foot of gas" is meant volume of gas expressed in cubic feet and computed at a base pressure of four (4) ounces per square inch above the average barometric pressure of 14.4 pounds per square inch, a standard base and flowing temperature of sixty (60) degrees Fahrenheit; correction to be made for pressure according to Boyle's Law, and for specific gravity according to test made by the Balance Method.

SECTION 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term "waste" among other things shall specifically include:

(a) The operation of any oil well, or wells with an inefficient gas-oil ratio.

(b) The drowning with water of any stratum or part thereof capable of producing gas in paying quantities.

(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

(d) Permitting any natural gas well to burn wastefully.

(e) The creation of unnecessary fire hazards.

(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

(g) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

(h) The production of natural gas in excess of transportation or market facilities, or reasonable market demand for the type of gas produced.

(i) The use of natural gas for the manufacture of carbon black without first having extracted the natural gasoline content from such gas.

(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

(k) Permitting any natural gas produced from a gas well to escape into the air before or after such gas has been processed for its gasoline content.

(l) The production of natural gas from a well producing oil from a stratum other than that in which the oil is found, unless such gas is produced in a separate string of casing from that in which the oil is produced.

(m) The production of more than one hundred thousand (100,000) cubic feet of gas to each barrel of crude petroleum oil unless such gas is put to one or more of the uses authorized for the type of such gas so produced under allocations made by the Commission.

SECTION 4. (a) If oil and/or gas be produced through different strings of casing set in the same well bore, the inner string through which oil and/or gas be produced shall be regarded as one well, and each successive additional string of casing through which oil and/or gas shall be produced, from a different producing horizon, the others producing through the same well bore, shall be regarded as another well.

(b) No person in possession of or operating any oil well shall produce from such well natural gas found in a horizon productive of natural gas only.

SECTION 5. The Commission is given authority to fix and determine the gas-oil ratio of all oil wells in this

State, but nothing in this Act shall be construed to authorize the limitation of the production of marginal wells, as such marginal wells are defined, below the amount fixed by statute. If any restriction imposed by the Commission upon the production of oil from any oil well operates to increase the gas-oil ratio of such well so as to then classify it as a gas well under the provisions of this Article, such well shall be deemed to be an oil well nevertheless.

SECTION 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

(1) To prevent the waste, as hereinbefore defined, of natural gas in drilling and producing operations and in the piping and distribution thereof.

(2) To require dry or abandoned wells to be plugged in such a way as to confine natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

(3) For the drilling of wells and preserving a record thereof.

(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

(6) To require records to be kept and reports made.

(7) To provide for the issuance of permits, and other evidences of permission when the issuance of such permits, or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law.

SECTION 7. After the expiration of ten (*1*) days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

(c) Bona Fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes including the manufacture of carbon black provided it is utilized in a plant producing a recovery of not less than one (1) pound of carbon black to each One thousand cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black.

(3) Casinghead gas may be used for any beneficial purpose which includes the manufacture of natural gasoline.

(4) Any producer of either sweet or sour gas or casinghead gas may use the same as gas lift in the bona fide production of oil where such gas is not used in excess of ten thousand (10,000) cubic feet per barrel of oil produced; provided that in order to prevent waste in any case where the facts in such case warrant it, the Commission may permit the use of additional quantities of gas to lift oil, provided all such gas so

used in excess of ten thousand (10,000) cubic feet for each barrel of oil shall be processed for natural gasoline and the residue burned for carbon black when same is reproduced.

SECTION 8. It shall be the duty of all persons, companies or corporations producing natural gas from any gas well to ascertain and determine during the months of January and July, respectively, of each year hereafter, through appropriate tests, to be made in the presence of and under the supervision of a representative of the Commission, and under uniform and generally recognized methods, and under regulations which shall be prescribed by the Commission, the open flow and rock pressure of each gas well from which natural gas shall be produced, and verified reports thereof shall be filed with the Commission on or before the tenth day of each of the months aforesaid; which said reports shall be kept on file with the Commission and shall become a permanent public record and shall be open to the inspection and examination of the public, and which said reports shall disclose the name of the representative of the Commission who was actually present when such tests were made. If any person producing gas from the same common reservoir be dissatisfied with the test as made and reported, such person may demand a second test to be made in the manner herein provided and in the presence of such person or his representative.

SECTION 9. The Railroad Commission shall require one of its duly authorized agents to inspect, read or test any meter, or meters, through which natural gas is being measured, or gauged, upon the request of any lessor, lessee, operator, or royalty owner from whose land, lease, or royalty interest natural gas is being produced.

SECTION 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and

regulate such production for the protection of public and private interests:

(a) In the prevention of waste as "waste" is defined herein;

(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

SECTION 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence at a hearing to be held as herein provided.

The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

SECTION 12. On or before the 20th day of each calendar month the Commission shall hold a hearing after notice has been given, as provided by law, for the purpose of determining the aggregate daily capacity to produce of all gas wells in a common reservoir, and as nearly as possible, the daily volume of gas from each common reservoir that will be produced from gas wells during the following month to be utilized as permitted in this Article. Upon such determination, the Commission, based upon evidence introduced at such hearing, shall allocate to each well producing gas from such common reservoir a percentage of the daily productive capacity of each well which may be produced daily during the following month from each gas well producing gas from such common reservoir. Such

percentage of the daily producing capacity of each well shall be regarded as its daily allowable production of such daily volume required for utilization from such common reservoir. The daily allowable production of each gas well shall be computed and allocated as provided in Section 13 and 14.

SECTION 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at 25 per cent of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take in consideration such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

SECTION 14. It shall be the duty of the Commission, after notice and hearing, to ascertain and determine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an amount equal to market demand or to an amount which may be produced without waste as otherwise defined; provided, however, the production of such gas shall in any event be restricted

to the amount of the reasonable market demand therefor. In such order the Commission shall allocate, distribute or apportion the total allowable production from such field among the various gas wells affected by the order on a reasonable basis, and as provided in Section 13. It shall likewise be the duty of the Commission to prorate the daily gas well production of sour gas produced from each common reservoir of sour gas in this State. The hearing for such purpose shall be held at the same time as the hearing pertaining to the proration of sweet gas well production. The proration of sour gas well production shall be accomplished according to the manner and method herein provided for the proration of sweet gas well production.

SECTION 15. Nothing contained in this Article shall require that the production from any gas well with a daily natural open flow of two hundred thousand (200,000) cubic feet of natural gas or more to be restricted to a quantity less than fifty thousand (50,000) cubic feet of natural gas daily; and nothing herein shall require that the production from any gas well with a daily natural open flow of less than two hundred thousand (200,000) cubic feet of gas be reduced to a quantity less than 25 per cent of its natural open flow.

In all common reservoirs producing both sweet and sour gas, no gas well shall be permitted to produce in excess of 25 per cent of its daily productive capacity; provided the Commission, upon a finding that reservoir conditions require that such percentage be increased to prevent waste, and that such increase will not create a drainage condition as between sweet and sour gas lands, may authorize an increase in such allowable production. Where the allowable production theretofore allocated to any well is more than 15 per cent of its daily producing capacity, and the Commission finds that the production of its daily allowable from such well will cause waste due to the intermingling of sweet and sour gas, the Commission may order the production from such well restricted to 15

per cent of its daily producing capacity, but this sentence shall not be construed to militate against the right of the Commission to fix the allowable production of any well below 15 per cent of its daily producing capacity in carrying out the requirements of Sections 13 and 14 of this Act.

SECTION 16. It shall be unlawful for any person to produce gas from a gas well as herein defined in excess of the daily allowable production in such schedule of allowable production. The rate of production from any gas well shall be deemed to be the average daily rate of production for the month.

SECTION 17. Where gas is produced from one stratum and oil and gas is produced from another stratum in the same well bore, the Commission shall take into account the amount of gas produced from the oil stratum in determining the amount of gas that may be produced from the stratum producing gas only and may subtract the amount of the casinghead gas produced from the dry gas that would be allocated to said well if it produced dry gas and may restrict the dry gas production accordingly.

SECTION 18. When unforeseen contingencies increase the demand for gas required by any distributor, transporter or purchaser to an amount in excess of the total allowable production of the wells to which he is connected, such distributor, transporter or purchaser is authorized to increase his take ratably from all such wells in order to supply his demand for gas, provided, however, that notice of such increase and the amount thereof shall be given to the Commission within five days; and provided further that the Commission, at its next hearing, shall adjust the inequality of withdrawals caused by such increase in fixing the allowable production of the various wells in the common reservoir or zone.

SECTION 19. If the Commission finds upon consideration of the evidence introduced at a hearing that either

or both of the purposes designated under Section 10 of this Article may be more adequately accomplished by zoning a common reservoir, the Commission shall zone such common reservoir. If the Commission zones such common reservoir, each zone shall be regarded as a separate common reservoir in making allocations of daily allowable production as provided in this Article. The Commission shall allocate to each zone its just proportion of the market demand for gas from the common reservoir, and shall establish appropriate rules and regulations applicable to each zone and shall have the right to adjust its orders to the practicable conditions which exist and to enter any reasonable order which is necessary to effectuate the purpose of this law. The Commission is expressly authorized to segregate a sour gas area from a sweet gas area and shall not be required to restrict the allowable production of the sour gas zone to the same percentages that may be produced from the sweet gas zone.

SECTION 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas.

SECTION 21. In order that land owners and operators that have undeveloped land within a proven natural gas field may secure a market for their natural gas, and in order that the market for natural gas may be more equitably distributed among the various land owners and operators, and in the interest of the conservation and development of natural gas, it is declared to be lawful for any two or more lessors, les-

sees, operators, or other persons, firms, or corporations owning or controlling production, leases, royalties or other interests in the separate properties of the same producing gas field, with the approval of the Attorney General of Texas, to enter into agreements for the purpose of bringing about cooperative development and/or operation of all or a part, or parts of such field, or for the purpose of fixing the time, location and manner of drilling and operating wells for the production, storage, marketing or the repressuring of gas, or for the purpose of the equitable distribution of royalty payments. Any such agreement shall bind only the parties thereto, and their successors and assigns of such having knowledge or notice thereof, and shall be enforceable in an action for specific performance.

SECTION 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purpose of said law.

SECTION 23. Any person violating any of the provisions of this Article shall be liable to a penalty not to exceed One Thousand Dollars ($1,000.00) for each offense, and each day's violation shall be a separate offense. Such penalty may be recovered by the State of Texas with the cost of suit in a civil action instituted in Travis County or in the County where the violation occurred by the Attorney General or by the County of District Attorney when joined by the Attorney General of Texas; and any and all violations or threatened violations of this Article may be enjoined by any Court of competent jurisdiction in which the suit for penalty may be brought, and in such cases the Court may issue such writs of injunction, mandatory or prohibitory, as the facts justify.

SECTION 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority

conferred by this Article, in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

SECTION 25. All laws or parts of laws in conflict with any of the provisions of this Act are hereby expressly repealed; provided that on account of the absence of pipe lines necessary to accomplish transportation of gas to carbon black plants from many areas producing sour gas in one or more of the common reservoirs of this State and in as much as many wells producing sweet gas are without market outlet for gas used as light and fuel which will require considerable time to make connection after hearing to determine the allowable production, it is provided that gas from a well producing sour gas only may be utilized as provided in said Article 6008 of the Revised Civil Statutes of 1925 as amended by the Acts of the First Called Session of the Forty-second Legislature, as amended by the Acts of the Regular Session of the Forty-third Legislature, as aforesaid, until October 1, 1935, and the gas from a well producing sweet gas may be utilized as authorized under said Act as amended until August 1, 1935, at which time this Article shall be effective as to sweet gas wells; provided, however, that nothing in this Act contained shall repeal, modify or impair any of the provisions of House Bill No. 782, relating to oil and gas conservation, enacted at this session of the Legislature, or shall impair the power of the Commission, proceeding under the oil and gas conservation laws of this State, to prevent waste.

SECTION 26. If any section or sections, clause, sentence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not affect in anywise the remaining parts of this Article, not so held, and all that portion not held invalid shall remain in full force and effect.

SECTION 27. The presence and imminence of evils occurring in the production and use of natural gas as a result of the waste in the production and use thereof in the absence of correlative opportunities of owners of gas in the common reservoirs of this State have created an emergency and imperative public necessity demanding the suspension of the Constitutional Rule requiring Bills to be read on three separate days in each House, and said Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted.

IV.

The judgment and decree sought to be reviewed was entered on March 31, 1936. The application for appeal was presented and allowed on June 23, 1936.

V.

This cause concerns the constitutionality as to complainant of certain provisions of the statute of the State of Texas, herein set out, and the orders of the Railroad Commission of Texas promulgated pursuant thereto. The provisions of said statute particularly complained of are Sections 2 and 7, wherein sweet and sour gas are defined and the permitted uses thereof prescribed. The orders of the Commission under attack are those orders classifying complainant's gas wells as sweet and sour gas wells and prohibiting the use by complainant of sweet gas in the manufacture of carbon black. In complainant's bill of complaint it is alleged that it is the owner and operator of a gasoline manufacturing plant located at Sanford, Hutchinson County, Texas; that it is connected with twenty-one wells in the vicinity of said plant, from all of which it has heretofore been receiving gas and processing the same in its gasoline plant for the purpose of extracting the gasoline content therefrom and utilizing the residue gas for the manufacture of carbon black; that certain of the wells con-

nected with complainant's plant, and the leases upon which such wells are located, are owned outright by complainant, and as to the others, complainant owns and holds gas contracts, under the terms of which it is obligated to take the gas therefrom for processing in its said plant; that such leases and wells are located in what is known as the Panhandle of Texas gas field, which field is underlaid by one single, or common, gas reservoir; that the gas in a portion of said field contains hydrogen sulphide and is known as sour gas, and that the gas contained in the balance of said field is free from hydrogen sulphide and is known as sweet gas; that there is no structural barrier between the sweet and sour areas; that pursuant to the provisions of said statute the Railroad Commission of Texas made tests of the wells connected with complainant's plant and classified fourteen of complainant's wells as sweet gas wells, and issued an order denying complainant the right to take gas from such fourteen wells so classified as sweet gas wells and utilizing the same in its gasoline plant and the residue for carbon black manufacture. That complainant has a contract with Combined Carbon Company, which owns and operates a carbon black manufacturing plant near complainant's gasoline plant, under the terms of which contract complainant is obligated to furnish residue gas from its said gasoline plant to the extent of the requirements of Combined Carbon Company. That the remaining seven wells connected with complainant's plant and classified by the Commission as sour gas wells, even though producing at the full 25 per cent of their open flow or capacity to produce, are insufficient for its requirements; that there is no unconnected available sour gas in the vicinity of complainant's plant which complainant can obtain to meet its requirements, and the enforcement of the provisions of said act and the orders of the Railroad Commission prohibiting the use of sweet gas in the manufacture of carbon black

would result in complainant's losing its carbon black contract with Combined Carbon Company and its gas contracts with the owners of the leases upon which are located the fourteen wells so classified by the Commission as sweet gas wells, and the closing down of its plant, and thus the provisions of said statute and orders of the Railroad Commission complained of would operate to deprive complainant of its rights guaranteed under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10 of the Constitution of the United States; and complainant prayed for interlocutory and permanent injunctions against the defendants, who are charged with the enforcement of said Statute, from interfering in any way with complainant in the utilization of gas from the wells connected with its plant in its operation for the manufacture of natural gasoline and carbon black.

The cause was heard and the ruling of the Court was that the State of Texas has power to conserve and prevent physical waste of its natural resources; that from the evidence the Court could not say that the provisions of the Statute complained of do not bear a reasonable relation to the prevention of waste and conservation of the natural resources of the State, and accordingly, said statute does not constitute an unreasonable interference with and confiscation of complainant's property; that the statute does not unlawfully discriminate between the owners of sweet and sour gas; that the definition of sour gas as contained in said statute is based upon fact foundation and that the operation of the statute does not impair the obligation of complainant's contracts, and the decree of the Court denied complainant an injunction against the defendants as prayed for.

VI.

It is contended that the questions involved are substantial in that if the provisions of said statute complained of,

and the orders of the Railroad Commission promulgated in pursuance thereto, be enforced against complainant and its properties, complainant will be denied sufficient gas to operate its said gasoline manufacturing plant and comply with its contract with Combined Carbon Company, and the enforcement of said statute and orders, therefore, would be tantamount to the taking of complainant's property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

VII.

The cases believed to sustain the jurisdiction of the Supreme Court are: *Lawton* v. *Steele,* 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. 499; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 49 Sup. Ct. 50, 70 L. Ed. 210; *Bartels* v. *Iowa,* 262 U. S. 412, 43 Sup. Ct. 628, 67 L. Ed. 1047; *Nectow* v. *Cambridge,* 277 U. S. 183, 72 L. Ed. 842; *Dobbins* v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169; *Liggett* v. *Baldridge,* 278 U. S. 104, 73 L. Ed. 204; *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 68 L. Ed. 813; *Weaver* v. *Palmer,* 270 U. S. 402, 70 L. Ed. 654; *Mayflower Farms* v. *Ten Eyck,* 80 L. Ed. 475.

There is appended to this statement copy of the opinion of the trial court denying complainant interlocutory injunction, and copy of opinion denying complainant permanent injunction. The opinion of the trial court upon application for interlocutory injunction is reported in 12 Fed. Supp. 519.

Respectfully submitted,

(Signed) F. W. FISCHER,
Tyler, Texas;

(Signed) L. M. FISCHER,
Amarillo, Texas,
Attorneys for Complainant,
The Henderson Company.

APPENDIX "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

In Equity.

No. 535.

THE HENDERSON COMPANY, *Complainant,*

versus

ERNEST O. THOMPSON *et al., Respondents.*

L. M. Fischer, Amarillo, Texas; F. W. Fischer, Tyler, Texas, Attorneys for Complainant.

Wm. McCraw, Attorney General of Texas; Archie B. Gray, Ass't Attorney General, Austin, Texas, Attorneys for Respondents.

Before Hutcheson, Circuit Judge, and Kennerly and McMillan, District Judges.

McMILLAN, *District Judge:*

Complainant, a Maine corporation, by Bill in Equity complains of the members of the Railroad Commission and the Attorney General of the State of Texas, and seeks to enjoin the enforcement so far as it is concerned of House Bill 266, Chapter 120, passed by the 44th Legislature, Regular Session 1935, and certain orders of the Railroad Commission purporting to have been made in pursuance thereof. The law and orders are attacked upon various constitutional grounds. The Federal jurisdiction, both on account of diversity of citizenship and federal question sufficiently appears. Jurisdiction in equity is also apparent. The case is one for a three-Judge Court and a hearing has been had before such court duly organized on Application for Preliminary Injunction. The matter is now submitted on sworn amended Bill and Answer, various ex parte affidavits and briefs.

Complainant is the owner and operator of a casinghead gasoline plant located in Hutchinson County, Texas, and is connected with twenty-one wells in the vicinity of that plant. Either by right of ownership or contract it has heretofore been receiving gas from those wells and extracting gasoline therefrom. Thereafter, under contract with Combined Carbon Company, it has been delivering the residue of that gas, less such as it used for plant operation, to said Carbon Company for the manufacture of carbon black.

The orders of the Railroad Commission now under attack attempt to classify Complainant's wells as sweet and sour; fourteen of them being designated as sweet and seven as sour. The purposes for which the sweet wells may be used are limited, with certain exceptions, practically to light and fuel; sour wells may still be used for the extraction of natural gasoline and the manufacture of carbon black.

Complainant attacks the Statute and orders issued thereunder on the conventional constitutional grounds, asserting generally that they are confiscatory, unreasonable, and arbitrary, deprive it of its property without due process of law, and impair the obligation of existing contracts. It alleges further that it has and can obtain no market or use for its gas other than that market and use which is now forbidden; that the closing down of its wells will cause its gas to be drawn off by other parties having markets for gas and drawing from the same general reservoir; that the manufacture of carbon black gas is a necessary and useful thing and can be and is being accomplished without waste. That the classification of, and differentiation between, sweet and sour wells is unreasonable and without foundation in fact.

The Respondents, while admitting many of Complainant's fact allegations, disagree with the conclusions of law drawn therefrom and assert that the Statute and orders of the Commission are valid police regulations and have a reasonable relation to the conservation of the State's natural resources and prevention of waste; they deny Complainant is suffering any irreparable injury by reason of the Statute or orders such as to entitle it to an interlocu-

tory injunction, and assert on the other hand that it has, or can without loss obtain for the time being, sufficient gas, both sweet and sour, to satisfy its requirements.

The facts adduced on the hearing by Affidavits take such a wide range that it would be impracticable without unduly prolonging this Opinion to set them out here. Generally speaking, the affidavits cover the kind and character of the gas reservoir in the Panhandle; the difference between sweet and sour gas; matters with regard to pressure; migration of gas, etc., all of which has been fully set out and covered in the various other gas cases arising before this Court and involving the Panhandle field. Also on Complainant's part there is a strong showing as to the absence of waste in the operations of itself or its vendee, the Combined Carbon Company.

The Complainant claims that it will need about thirty million cubic feet of gas a day to fill its contract with the Combined Carbon Company. Under the orders of the Railroad Commission it seems to have that much gas available from the seven wells classified as sour. In addition to this thirty million cubic feet, it claims that it needs for plant and lease operation an additional eight million feet which, according to its affidavits, under the orders of the Commission it will be unable to get.

Respondents by affidavits assert Complainant can obtain this gas from the fourteen wells classified as sweet, their proof tending to show that from these wells the allowable under the Commission's orders will run somewhere between seven and eight million feet a day. This the Complainant in part denies, asserting on the contrary that their contracts with regard to their sweet wells only allows them to use that gas for casinghead gasoline operations.

The parties have briefed and submitted the case at cross-purposes. Respondents have assumed as an absolute arbitrary proposition of law that the Legislature had the general absolute right under any circumstances or conditions to prohibit the use of gas for the making of carbon black. On that postulate they rest their case so far as the general validity of the Statute and orders are concerned. Accordingly, they make no endeavor to establish as a factual

proposition that the use of gas for making of carbon black is wasteful. They content themselves with the bald proposition that the Legislative fiat is sufficient to bind the court in that respect. The Complainant, on the other hand, undertakes the burden of establishing that the manufacture of carbon black is not a wasteful use of its gas; that carbon black is one of the most necessary articles today known to commerce; that the gas is completely consumed in its manufacture; that the result accomplished by manufacturing carbon black is as useful and necessary as any other thing that could be accomplished by the burning of gas.

With the record in this attitude the Court is not content to pass upon the ultimate validity of this Act of the Legislature on this Application for a Preliminary Injunction. The right of the Legislature to regulate these various matters connected with the production of oil and gas, in so far as Texas is concerned, has always been hinged on the doctrine of conservation of natural resources and the prevention of waste. Amazon Petroleum Corporation *v.* Railroad Commission, 5th Fed. (Supp.) 633; McMillan *v.* R. R. Com., 51 Fed. (2) 400: F. C. Henderson, Inc. *v.* R. R. Com., 56 Fed. (2) 218; Danciger Oil & Ref. Co. *v.* R. R. Com., 49 S. W. (2) 837, 842; 56 S. W. (2) 1075 (C. C. A.); Peoples Pet. Producers Co. *v.* Sterling, 60 Fed. (2) 1041; Peoples Pet. Producers Co., *v.* Smith, 1 Fed. (Supp.) 361; Canadian River Gas Co., *v.* Terrell, 4 Fed. (Supp.) 222. If the regulation has no reasonable relationship to these matters, then it constitutes an unreasonable interference with the rights of private property. We are unwilling at this time to hold that the mere legislative declaration that a certain use of gas is wasteful is conclusive and are inclined on the contrary to the opinion that the fact question involved is justiciable.

However, it does not follow that because of these conclusions Complainant is entitled to its interlocutory injunction as a matter of right. These preliminary injunctions do not issue as a matter of course. Coupled with a *prima facie* showing indicating that Complainant will eventually be able to establish the invalidity of the orders attacked in the trial on the merits, there must be clear and strong showing of immediate and irreparable injury in event the enforcement

of the orders attacked is not stayed. We are not at all convinced that the Complainant has discharged that burden in this case.

Its Secretary and General Manager in his affidavit says that during the month when the Bill was filed the carbon plant actually utilized a daily average of 27,426,000 cubic feet of gas; that the daily allowable from the seven wells classified as sour, less the gasoline content which is extracted, is now approximately 31,277,800 cubic feet, thus leaving almost 4,000,000 cubic feet over and above what the carbon plant was using in the month of July. There is a general statement in his affidavit that the Affiant is informed that the future requirements of the Carbon Company will run its daily use up to 30,000,000 cubic feet a day, but there is nothing further than this general assertion to support that fact. It is perfectly obvious that so far as the carbon black phase of the matter is concerned Complainant has, even under the orders attacked, more than enough gas to protect the situation with probably a surplus of several million cubic feet a day.

But Complainant contends it has use for approximately an additional 8,000,000 cubic feet daily for plant and lease operations.

Respondents say in answer to this, by way of plea and affidavits, that Complainant has under contract from its various other wells approximately 8,000,000 cubic feet per day which can be so used under the existing orders. The Complainant denies this and says on the contrary that under its contracts this gas can only be used for the manufacture of casinghead gasoline. An inspection of one of these contracts, said to be typical, indicates that the method of payment agreed on between Complainant and its Vendees is by a determination of the proportionate part of the gasoline stripped from the gas. The contract expressly provides that it is subject to all legal rules and regulations now in force or which may thereafter be promulgated. There is no clear, express showing that Complainant will not be able to obtain, either from that source by additional contract if necessary, or from other sources the gas which it may need for plant and field operation. Furthermore the statement as to this amount of gas needed for those pur-

poses is merely the unsupported conclusion of the Affiant, General Manager, and no facts or detailed account is given with regard to, or of, the necessity which makes it imperative for Complainant to have this additional amount of gas.

Having all these matters in mind and giving due regard to the proper balancing of conveniences, it is the opinion of the Court that the Complainant has failed to establish that the present temporary enforcement of the orders complained of is causing or will, prior to the time that the case can be tried on its merits, cause Complainant any irreparable injury. It follows that the Preliminary Injunction prayed for will be denied.

(Signed) T. M. KENNERLY (McM.),
District Judge.

(Signed) J. C. HUTCHESON, JR. (McM.),
Circuit Judge.

(Signed) ROBERT J. McMILLAN,
District Judge.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION.

In Equity.

No. 535.

THE HENDERSON COMPANY

vs.

ERNEST O. THOMPSON *et al.*

and

No. 581.

PORTLAND GASOLINE COMPANY

vs.

ERNEST O. THOMPSON *et al.*

Before Hutcheson, Circuit Judge and Kennerly and McMillan, District Judges

McMILLAN, *District Judge:*

These two cases are now before the Court for final hearing on the merits. While there are slight variations in the facts with regard to the two Complainants, the general principles underlying the cases are the same, and the two cases while not consolidated, were tried together and may be disposed in the one opinion.

The Henderson case has been before this Court before on Application for Preliminary Injunction. Henderson Company *v.* E. O. Thompson, et als., 12 Fed. Supp. 519. The Portland case has not heretofore been before the Court on Application for Preliminary Injunction, but the Complainant while continuing to press for temporary relief, has agreed, in open Court, with Respondents that the case will be considered as also finally submitted on its merits.

The Henderson Company is a Maine corporation and the Portland Company is a Delaware corporation and the Court has jurisdiction in both cases, both because of diversity of citizenship and federal question, coupled with the requisite amount in controversy. Jurisdiction in equity is also apparent on the face of the records.

Complainants assail House Bill 266, Chapter 20, passed by the 44th Legislature, Regular Session, 1935, and certain orders of the Railroad Commission purporting to have been made by virtue thereof. Their grievance against the Statute lies in the restrictions which it places upon the use of sweet gas. Their attack against the orders of the Commission is incidental inasmuch as those orders simply purport to carry out the mandate of the Statute and classify certain of the complainants' wells as sweet and sour. While the Bills of Complaint also attack the orders of the Commission with regard to the proration features thereof, that phase of the matter has been expressly abandoned by the Henderson Company insofar as this case is concerned, by statements made in its briefs, and impliedly by the Portland Company by its failure to press that contention, either in its evidence or in its briefs.

Accordingly, the matter at issue narrows down to whether the action of the Legislature in restricting the uses to which sweet gas may be put and in defining what constitutes sweet gas, is unconstitutional as applied to Complainants. The Statute insofar as it is called in question here will, for convenience, be footnoted in this opinion.*

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*(Acts 44 Leg., 1935. Vernon's Ann. Civ. Stat. (Supp.) Art. 6008.)

SECTION 1. Declaration of policy: In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of

Complainants either by contract or ownership have been taking gas from a great number of wells in the Panhandle field in Texas, and after stripping same for its gasoline content and using a part of the remainder for plant and lease purposes, delivering the residue by virtue of contract to certain carbon black plants, where that gas is burned for the purpose of making carbon black without further use being made thereof. After the passage of the Statute attacked, the Railroad Commission conducted a series of tests and classified Complainants' wells as sweet or sour. A great majority of the Henderson Company's wells have been classified as sweet and the allowable from its sour wells is insufficient to cover its requirements. Thirteen of the Portland Company's wells produce casinghead gas

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public and private interests against such evils by prohibiting waste and compelling ratable production.

Article 6008 (of the R. T. C. S. of Texas of 1925 as amended, etc.) is hereby amended so as to hereafter read as follows:

SEC. 2. Unless the context otherwise requires, the words defined in this section shall have the following meaning when used in this article towit:

* * * * * * *

(g) The term "sour gas" shall mean any natural gas containing more than one and one-half grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the commission to be unfit for use in generating light or fuel for domestic purposes.

(h) The term "sweet gas" shall mean all natural gas except "sour gas" and "casinghead gas".

(i) The term "casinghead gas" shall mean any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil.

which may be used for carbon black manufacture, but the production from those wells, coupled with its allowable from its sour gas wells, is insufficient to meet its requirements. The rub with regard to both Complainants lies in the inhibition of the Statute against the use of sweet gas for the manufacture of carbon black. If Complainants were allowed to use the gas from their sweet wells to fulfill their contracts with the carbon black companies they would be without complaint so far as the present case is concerned. Accordingly, as indicated, the matter finally narrows down to the question whether the Legislature was within the law in defining what constitutes sweet and sour gas and forbidding the use of the sweet gas for the making of carbon black.

(j) The term "natural gasoline" shall apply to gasoline manufactured from casinghead or from any natural gas.

SEC. 3. The production, transportation or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited.

* * * * * * *

(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

SEC. 7. After the expiration of ten days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

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(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

(c) Bona fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure

Complainants attack the Statute on substantially three grounds, one of which divides itself into two propositions. First, they assert that the Statute bears no reasonable relationship to the prevention of waste and accordingly, is not a conservation of the natural resources of the State and constitutes an unreasonable interference with and confiscation of their property. Second, they assert that the Statute unlawfully discriminates between the owners of sweet and sour gas and as a further proposition in this connection, they say that the definition of sour gas contained in subdivision (g) of Section 2 is without basis or foundation in fact and accordingly void. Third, they assert that the operation of the Statute impairs the obligation of their contracts with the carbon black companies in violation of the Constitution of the State of Texas.

The case has been thoroughly developed by exparte affidavits introduced by agreement of the parties, by oral testimony and by numerous maps, exhibits and much documentary evidence. It has been thoroughly argued and fully and carefully briefed by both sides. The evidence has taken a wide range and it is impracticable to do more than

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or otherwise increase the ultimate recovery of oil or gas from such horizon.

(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes, including the manufacture of carbon black, provided it is utilized in a plant producing a recovery of not less than one pound of carbon black to each one thousand cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black.

(3) Casinghead gas may be used for any beneficial purpose, which includes the manufacture of natural gasoline.

summarize it and refer to it briefly in the course of thi
opinion.

The carbon black industry has been nomadic, journey
ing from field to field ever in quest of cheap gas. For ove
sixty years it has existed in the country moving generall
Westward first in Pennsylvania, then in West Virgini
then Louisiana, then Kentucky and latterly coming int
Texas, Oklahoma, Utah, Montana and Wyoming. As th
various States tightened their regulations by Statutes an
orders the industry moved on until now it is largely cen
tered in the Panhandle field of Texas and from that gian
reservoir approximately eighty per cent of the carbon blac
manufactured today is being derived.

There have been few improvements made in the metho
of manufacturing since 1892, the one commonly employe
and employed by Complainants, being the channel proces
It is unnecessary to describe this process here as it is full
described by the Supreme Court in Walls *v.* Midland Ca
bon Co., 254 U. S. 300. Either sweet or sour or casinghea
gas may be used in its production, and from the burning o
one thousand cubic feet of gas approximately one and one
half pounds of carbon black is made. The gas is entirel
used in the manufacture of carbon black and there is n
residue that can be devoted to any other useful purpose.

Carbon black is worth about four cents a pound. Fro
the gas before its ultimate burning there is stripped a fra
tion of a gallon of gasoline, which is worth from two t
three cents. A producer of sweet gas who is able to marke
same for Statutory purposes receives about three or fou
cents a thousand in the field. When delivered at the burne
tips it sells for various greatly increases amounts. Th
producers of gas who sell to the Companies that strip
and then burn it for carbon black receive less than a cen
per thousand cubic feet.

Sweet gas is available without treatment for fuel an
light, but sour gas cannot be so used without bein
scrubbed or processed, as the hydrogen sulphide conten
makes it corrosive thereby injuring the pipe lines, equip
ment, burners and other mechanical appliances throug
which it has to pass. In addition thereto, its odor an

detrimental effect on the health of persons adjacent to it when burning renders it undesirable to use for fuel or light.

There is evidence in the record to indicate that probably as much as thirty pounds of carbon can be recovered from one thousand cubic feet of gas by other processes than those used by Complainants. The evidence would also indicate that this carbon so recovered is not what is commonly known as carbon black inasmuch as it is coarser in its texture and not available for many of the uses to which carbon black is put. There is some indication that restriction upon the use of gas may cause advancement in the industry which will recover a greater yield of carbon black, but up to the present time there is no indication that any better methods have been developed than the channel process.

Carbon black has a wide range in its usefulness, it being used in the manufacture of printer's ink, automobile tires, rubber products, paint, varnish, typewriter ribbons, colored paper, lacquers, stove polish, shoe polish, book binders' board, crayons, golf balls, tarpaulins, insulating material, phonograph records, cement, tile and artificial stone. So far as is known it can only be manufactured from natural gas.

There are twenty-nine carbon black plants operating in the Panhandle field with an average consumption of approximately five hundred and fifty million cubic feet per day. This amount is only slightly less than the average daily amount taken by all the pipe lines for fuel and light purposes. When the carbon black industry first came into the Panhandle field it practically used only casinghead gas, but afterwards by virtue of amended Statutes and orders it commenced to use in addition thereto both sweet and sour gas. The Panhandle field is the largest gas field known in the world today. It has a length of about 125 miles and varies in width from 10 to 40 miles. While the field is apparently a common reservoir there is a line of demarkation which fairly separates the sour gas area from the sweet gas area. Along the sour gas area there are oil fields and in the past great waste of gas has taken place adjacent to

these fields. Accordingly, as a general thing the pressures in the sour gas area are lower than those in the sweet gas area. Lowering the pressure tends to cause migration from higher pressure areas to lower pressure areas, but the length of time which it takes to accomplish this is not definitely known. Expert opinion, based upon substantial facts, sustains the view that there is enough sour gas in reserve in the Panhandle field to fulfill the world's requirements of carbon black for many years to come.

The statement of facts with regard to this vast field and the carbon black industry might, on the record as it now stands, be protracted indefinitely. We consider it unnecessary to go into the matter any further for the purposes of this decision. The matters have been covered generally by this Court in many other cases involving this same field.

In line with Complainants' contentions it is first necessary to consider whether the Statute has any reasonable relationship to the conservation of the natural resources of the State and the prevention of waste. We held on the Application for Preliminary Injunction in the Henderson Case that the mere Legislative declaration of waste was not conclusive if facts could be adduced which clearly indicated the contrary. The Constitution of the State of Texas delegates to the Legislature the power to conserve the natural resources of the State, and that gas constitutes one of those natural resources is now too well settled to admit of further controversy.

Regulations looking to the conservation of gas and the prevention of its waste may be validly made, and if they have a reasonable relationship to those things it is immaterial that they interfere with the uses which the individual may desire to make of his property. A Texas landowner owns the gas in place under his land and he may withdraw the same by mining operations, and if in the course of so doing, part of his neighbor's gas migrates to his land he may withdraw that gas without liability. The statement of these facts, coupled with the known migratory character of gas, immediately makes it apparent that there must be some limitations upon these property rights which exist in the land owner. While he has the unquestioned right to withdraw his gas, and such gas as may migrate to his

land, it is perfectly evident that if he does so in a wasteful manner or for a wasteful purpose he has exceeded any property right which he may have been thought to have had. The migratory nature of gas distinguishes it from other minerals which are fixed. An owner of a coal mine or of a sulphur mine might withdraw his minerals and destroy them without injury to his neighbor other than such injury as he sustains in common with the general public in that economic loss, but the owner of a gas well, who under the capture doctrine, withdraws gas which has theretofore been his neighbor's and uses it wastefully, thereby not only destroys a natural resource of the State but impinges upon the rights of others in a common reservoir.

These principles so far as matters pertaining to underground waste per se, such as operations which cause channeling, coning, entrapment, etc., are concerned, are now undisputed. There is no good reason why they should not equally apply to forbid the withdrawal of gas from a common reservoir to be wastefully used above the ground. The effect of the Statute is in fact to regulate the gas in the reservoir by preventing its withdrawal for use in a wasteful manner.

It is thoroughly settled that the popping off of gas into the air is a wasteful practice which may be forbidden; that the production of an oil well with an inefficient gas oil ratio may be stopped; that gas wells may under certain circumstances be ordered plugged, and the stripping of gas for the purpose of securing its gasoline content may be prohibited. See Lindsley *v.* Natural Carbonic Co., 200 U. S. 61; Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Bandini Petroleum Co. *v.* Superior Court, Los Angeles County, California, 284 U. S. 8 and F. C. Henderson, Inc. *v.* R. R. Com., 56 Fed. (2) 218.

If this be true how can it be successfully argued that it lies beyond the power of the State to forbid the burning of sweet gas to manufacture carbon black. It is unquestionably true that carbon black is a useful product necessary to the commerce of the world, but the same can be said of gasoline. If the stripping of gas to obtain gasoline is held to be wasteful, as was done in the Henderson case, because of the disproportion between the large amount of gas used

and the small amount of gasoline recovered, is there any legitimate reason why the same rule should not be applied to the manufacture of carbon black? Is the Legislature not entitled to consider and determine whether the results obtained by destroying this natural resource are commensurate with the injury that is done?

The question of the value of the product obtained as compared to the value of the raw gas is not at all determinative of the matter. We are not convinced that complainants' method of approach, that is to say, the value of a pound of carbon black plus the gasoline stripped as compared to the sale price in the field of a thousand cubic feet of gas is correct. Many contingencies enter into the value of these two commodities which are not covered by the simple statement of their market price in the field. However, regardless of that question, the matters of values are not controlling. The question of the utility of carbon black as against the utility of sweet gas for light and fuel does not finally determine the issue. As said by the Supreme Court in the Walls case in passing on that contention:

> "The fact, however, is but of incidental importance. The determining consideration is the power of the State over, and its regulation of a property in which others besides the companies may have rights and in which the State has an interest to adjust and preserve, natural gas being one of the resources of the State. And in this consideration it is more important to consider not for what a particular owner uses the gas, but the proportion of his use to that of others, or it may be, the prevention of use by others." * * *

The State in the conservation of its natural resources is not without power to consider the uses to which those resources are most appropriately adapted and to conserve certain resources for public uses, although the result thereof may be to destroy another use.

"When forced to such a choice the State does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in

the judgment of the legislature, is of greater value to the public." Miller *v.* Schoene, 276 U. S. 272.

If upon the facts of the case the legislature has decided that the burning of sweet gas to make carbon black constitutes too great a destruction of a natural resource of the State for the result accomplished, and that on the other hand, it is more desirable for that gas to be devoted to other necessary uses, it does not lie within the power of the Court to review that determination and substitute its judgment, conscience and discretion for the judgment, conscience and discretion of the legislative body. Unless the determination of the Legislature is clearly without factual support thereby rendering it arbitrary and unreasonable the Court is without power to intervene.

Having these general principles in mind and carrying in mind also the facts as we have heretofore stated them, we are unable to say that the Statute attacked does not bear a reasonable relationship to the conservation of the natural resources of the State. The views which we have expressed are directly sustained by the decision of the Supreme Court in Walls *v.* Midland Carbon Co., *Supra*, and generally by such decisions as Ohio Co *v.* Indiana, 177 U. S. 190; Bandini Petroleum Co. *v.* Superior Court, Los Angeles County, California, 284 U. S. 8 and Henderson *v.* R. R. Com., 56 Fed. (2) 218.

Complainants attempt to differentiate the Walls case because of the difference in the title to gas in place as between Texas and Wyoming. With regard to the matters at issue here the distinction is without importance. Oxford Oil Co. *v.* Atlantic Oil & Producing Co., 16 Fed. (2) 639; 22 Fed. (2) 597.

We come accordingly then to Complainants' second contention that the Statute is void because of discrimination as between the sweet and sour gas owners and because there is no basis in fact for the definition of sour gas. There can be no question of the right of the legislature to classify if the classification operates equally upon all parties within the class and is based upon some valid grounds of distinction. Lindsley *v.* Natural Carbonic Gas Co., Supra; Middleton *v.* Texas Power & Light Co., 249 U. S. 152.

That the Statute operates equally upon all parties within the classification can not be gainsaid. That the classification is not arbitrary because resting upon a reasonable basis we think to be equally apparent. It is unnecessary to rehearse the facts. Briefly it may be stated that sweet gas is available without treatment for light and fuel uses; sour gas is not. While carbon black may be made from sweet gas it can also be made with practically equal facility from sour gas. As a matter of marshalling the natural resources of the State the legislature has the power when one resource is fitted for two uses and another resource for only one, to classify those natural resources as to the use to be made of them. That is to say, that proceeding on the premise that the regulation generally is one tending to the conservation of the natural resources should not be classified if a valid difference exists between them.

The State at this time does not completely outlaw the carbon black industry, but on the contrary devotes to it an enormous supply of its gas reserves. The distinction made between sweet and sour gas having its basis upon a solid foundation of facts, Complainants are in no position to complain because sour gas may be used for carbon black while sweet gas may not.

Complainants' contention that the legislative definition of sour gas is unsupported by the facts is untenable. While the evidence indicates that gas containing approximately one and one-half grains of hydrogen sulphide per hundred cubic feet may be very easily and economically processed, the fact still remains that it has to be treated before it is available for use for light and fuel to the same extent, and as satisfactorily, as gases of lower sulphide content. The Court is unable to say the legislative definition is arbitrary or unreasonable.

As heretofore noted, Complainants' third ground of attack rests upon the claimed impairment of their contracts with the carbon black companies in violation of Section 16, Article 1 of the State Constitution. Here they base their reliance upon Traveler's Insurance Co. *v.* Marshall, 76 S. W. (2) 1007, a decision by the Supreme Court of Texas. The decision does not support their position insofar as the facts of these cases are concerned. There the effect of the

Act, which was a Moratorium Statute, was to operate directly upon certain contractual obligations. Here the Act touches the contracts only incidentally and by virtue of an exercise of the inherent police power existing in the State. While the power of directly impairing contractual obligations may have been withdrawn from the general power of the Government by the Texas Constitution, that instrument has never been held to avoid a police Statute dealing directly with physical things in the interest of the public welfare, and touching contractual relationships only incidentally as they may have attached to those physical things prior to the passage of the Statute.

Where matters affect the public safety, health, welfare, morals or well-being they may not by contract be placed beyond the power of the State to regulate and control them. The argument defeats itself. If it were conceded to be true any individual could by contract place his business or property beyond the realm of the police power. The protection relied upon by Complainants is given only against direct impairment and not that indirect abrogation, which flows incidentally from the valid exercise of the police power.

The parts of the Statute and the orders under attack here are authorized by the Constitution of the State of Texas and in no way contravene the Constitution of the United States. Unlike the proration order concerning which we have written in an opinion handed down today in Consolidated Gas Utilities Corporation et al. *v.* Thompson et al., the Statute and order in question insofar as they define and classify sweet, sour and casinghead gas and regulate the use thereof, are true waste measures, bearing a reasonable relationship to the conservation of the natural resources of the State. As such they must be sustained.

The injunction will be denied.

(Signed) J. C. HUTCHESON, JR.,
Circuit Judge.

" T. M. KENNERLY,
District Judge.

" ROBERT J. MCMILLAN,
District Judge.

(8251-C)